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Subaletchemy a/p Subramaniam v Mohd Azmi bin Abd Aziz (Tulasinathan a/l Balakrishnan, third party)

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HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12B-177–5 OF 2014
LIM CHONG FONG JC
24 OCTOBER 2014

C

Tort — Negligence — Road accident — Liability — Collision between motorcycle ridden by third party with appellant as pillion and motorcycle by first respondent — Allocation of liability dependent on sessions court judge of conflicting version of fact by parties — Sessions court judge preferred version proffered by respondent — Appeal against decision of sessions court

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This was an appeal against the judgment of the sessions court in relation to a road accident which involved the collision between the motorcycle ridden by the third party together with the appellant as pillion and the motorcycle ridden by the first respondent. As a result of the collision, the appellant suffered personal injury. The sessions court judge ('SCJ') dismissed the appellant's claim after trial but the SCJ also provisionally assessed the general damages awardable to the appellant for close distal left fibula fracture at RM20,000 in the event the appeal against liability was successful. The finding of fault and hence allocation of liability was dependent on the SCJ's assessment of the conflicting version of fact put up by the parties. The appellant's case was that the respondent collided onto them from behind whereas the respondent's case was that the third party suddenly switched lane without warning signal. The SCJ preferred the version proffered by the respondent because the third party contradicted himself during examination in court. Hence, the present appeal.

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Held, dismissing the appeal with costs of RM2,000:

(1) Appellate intervention could not be justified. There was no reason to conclude that the SCJ who had the opportunity to hear and observe the demeanour of the witnesses erred in her factual findings. Her conclusions were also consistent with the contemporaneous police report made by the third party himself that the collision was on the rear right of his motorcycle that caused him to fall. This was suggestive of impact due to lane switching instead of direct rear collision (see para 10).

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[Bahasa Malaysia summary

Ini adalah rayuan terhadap penghakiman mahkamah sesyen berkaitan kemalangan jalanraya yang melibatkan motosikal yang ditunggang oleh pihak

ketiga bersama dengan perayu sebagai pembonceng dan motosikal yang ditunggang oleh responden pertama. Akibat perlanggaran, perayu mengalami kecederaan diri. Hakim mahkamah sesyen ('HMS') menolak tuntutan perayu selepas perbicaraan tetapi HMS juga secara sementara menaksir ganti ruji am yang boleh diawardkan kepada perayu untuk *close distal left fibula fracture* pada RM20,000 jika rayuan terhadap liabiliti berjaya. Dapatan kesalahan dan dengan itu peruntukan liabiliti adalah bergantung ke atas penaksiran HMS terhadap versi konflik fakta yang dikemukakan oleh pihak-pihak. Kes perayu adalah bahawa responden berlanggar dengan mereka dari belakang manakala kes responden adalah bahawa pihak ketiga tiba-tiba menukar lorong tanpa tanda amaran. HMS lebih suka versi oleh responden kerana versi pihak ketiga bercanggah semasa pemeriksaan di mahkamah. Maka, rayuan ini.

Diputuskan, menolak rayuan dengan kos RM2,000:

(1) Campur tangan mahkamah rayuan tidak dapat dijustifikasi. Tidak terdapat alasan untuk menyimpul bahawa HMS yang mempunyai peluang untuk mendengar dan memerhati kelakuan saksi-saksi terkhilaf dalam dapatan faktanya. Kesimpulannya adalah juga konsisten dengan laporan polis semasa yang dibuat oleh pihak ketiga sendiri bahawa perlanggaran adalah di sebelah kanan belakang motosikalnya yang menyebabkan dia jatuh. Ini adalah menandakan hentaman akibat penukaran lorong bukan perlanggaran arah belakang (lihat perenggan 10).]

Notes

For cases on road accident, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1601–1900.

Cases referred to

Renal Link (KL) Sdn Bhd v Dato Dr Harnam Singh [1997] 2 MLJ 373, CA (refd)
Siti Aisha binti Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124, FC (refd)
Tabarani b Mohd Arshad & Anor v Chan Ten Yeu [1999] MLJU 126, HC (refd)

Tamilarasi Muthu (Lawrence Pereira & Partners) for the appellant.
M Ravendran (M Ravendran & Associates) for the respondent.

Lim Chong Fong JC:

[1] This is the appeal against the judgment of the sessions court dated 18 July 2014 in relation to a road accident.

[2] The road accident occurred on 15 August 2011 at Batu 13, Jalan Kuala Selangor, Selangor Darul Ehsan. It involved the collision between motorcycle bearing registration No WNE 1276 ridden by the third party together with the appellant/plaintiff as pillion and motorcycle bearing registration no WRW 4798 ridden by the first respondent/defendant. As the result of the collision, the appellant/plaintiff suffered personal injury.

[3] The learned sessions court judge dismissed the appellant/plaintiff's claim after trial. That notwithstanding, the learned judge also provisionally assessed the general damages awardable to the appellant for close distal left fibula fracture at RM20,000 in the event the appeal against liability is successful.

[4] The appeal was heard before me on 17 October 2014.

[5] I have reviewed the learned judge's grounds of judgment against the appeal record and submissions of counsel.

[6] The finding of fault and hence allocation of liability was dependent on the learned judge's assessment of the conflicting version of fact put up by the parties. The appellant's case was that the respondent collided on to them from behind whereas the respondent's case was that the third party suddenly switched lanes without warning signal.

[7] The evidence to support their respective versions was based on the oral testimony of the parties. It is seen from the learned judge's grounds of judgment that she preferred the version proffered by the respondent because the third party contradicted himself during examination in court. She did not find him to be a credible witness and she pointed out that the contemporaneous police report made by the appellant conflicted with his testimony in court pertaining to the switching of lanes. He was wavering between switching lanes from left to right and vice versa.

[8] In *Renal Link (KL) Sdn Bhd v Dato Dr Harnam Singh* [1997] 2 MLJ 373, Gopal Sri Ram JCA (as he then was) said:

> In our judgment, this appeal really turns on a pure question of fact based upon the credibility of the witnesses who gave their evidence at the trial. The function of determining where the truth lies, on a balance of probabilities, is entrusted by law to the trial court. Unless, we, as a court of appeal, are convinced that there was no

judicial appreciation of the evidence by the trier of fact, or that the audio visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case when taken as a whole, it would not be open to us, to intervene and upset the findings made by a trial judge.

The judgment under appeal in the present instance does not contain any error warranting appellate interference. On the other hand we are satisfied that the learned judge had done all that is required of her by law. She has admirably analysed the material before her and drawn inferences properly admitted by the evidence.

[9] In the Federal Court case of *Siti Aisha binti Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 also involving a motor collision, Abdul Hamid FJ (as he then was) said:

We are of the same view that an appellate court may be justified in coming to a different conclusion if there is valid reason to think that the trial judge had not taken proper advantage of his having seen and heard the witnesses.

[10] I have no reason here to conclude that the learned judge who had the opportunity to hear and observe the demeanour of the witnesses erred in her factual findings. From my own independent review of the cold appeal record, I find that her conclusions were also consistent with the contemporaneous police report made by the third party himself that the collision was on the rear right of his motorcycle that caused him to fall. This is to my mind suggestive of impact due to lane switching instead of direct rear collision. The evidential value of the contemporaneous police report was dealt by Abdul Malik Ishak J (as he then was) in *Tabarani b Mohd Arshad & Anor v Chan Ten Yeu* [1999] MLJU 126 that: '*The trial court should also have taken into account, when accepting the evidence given by the first defendant in court tallied in material particulars with the police reports he made 30 minutes after the accident, which must be read favorably in the defendant's benefit.*'

[11] In the circumstances, appellate intervention here cannot be justified. Accordingly, it is also unnecessary to deal with the provisional award of RM20,000 damages assessed by the learned judge.

[12] In the premises, this appeal is dismissed with costs of RM2,000.

Appeal dismissed with costs of RM2,000.

Reported by Afiq Mohamad Noor